IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 109 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GENAJI KHUMAJI MALI & 1 - Appellant(s)
Versus
AMRUBEN RANAJI RABARI & 11 - Defendant(s)

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Appearance :

MR SATYEN RAVAL for MR VIPUL S MODI for Appellant(s) : 1 - 2.
None for Defendant(s) : 1 - 2, 2.2.2, 2.2.3, 2.2.4, 2.2.5, 2.2.6,2.2.7
MR DHAVAL M BAROT for Respondent(s) : 1.2.1, 1.2.2, 1.2.3, 1.2.4,1.2.5 - 2.

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 24/01/2007

ORAL JUDGMENT

1. Shri Satyen B. Raval, learned counsel for the appellant under the authority of Shri Vipul

Modi. Shri Dhaval M. Barot, learned counsel for the respondents no. 1/1 and 1/2. None for others. The parties are heard.

2. The plaintiffs-appellant had filed the suit seeking prohibitory injunction against the defendants that they be restrained from interfering with possession of the plaintiffs over the suit property. The defendants, after notice appeared and submitted that they were in possession of the property and under the circumstances, no injunction could be granted. Their submission was that they were in possession of the property as tenants and the question of tenancy could not be decided by the Civil Court.

3. During pendency of the suit, an application under Order-VI Rule 17 of the Code of Civil Procedure was filed by the plaintiffs to add and amend para-14[1] claiming restoration of possession of the suit land on the ground that since after filing of the suit, the plaintiffs have been dispossessed. The application was contested and was dismissed on 16.2.2000.

Undisputedly, the said order was not challenged in a duly constituted revision petition. During course of the evidence, the plaintiff in his statement which was recorded on 4.9.2000 stated before the Court that he was not in possession of the property as he was already dispossessed. The defendants also appeared and submitted that they were in possession of the property even before the suit was filed. The learned trial court, after hearing the parties held that the plaintiff was entitled to desired injunction. The defendants, being aggrieved by the said judgment and decree filed an appeal. The appellate court, after re-appreciating the evidence and after taking into consideration the admissions made by the plaintiffs, rejection of their application and the order passed by this Court whereunder somewhere in the year 1998 the defendants were restrained by an interim order from transferring possession of the land, held that as the plaintiffs were not in possession on the date of the suit, they were not entitled to any decree for injunction. The appellate court

accordingly set aside the said judgment and decree. Being aggrieved by the said judgment and decree, the plaintiffs-appellants have filed this appeal. The appeal has been admitted for hearing the parties on 16.12.2003 on the following substantial questions of law:-

"[1] Whether the District Court erred in law in reversing the decree of trial court when its findings are merely of possession of defendants after the date of the suit, when on undisputed title of the plaintiffs, decree for possession should be passed in view of Article 65 of the Limitation Act, 1963?

[2] Whether the appellate court was right in holding that possession cannot be restored without a prayer even when dispossession occurred during the pendency of the proceedings?

[3] Whether the lower appellate court erred in law in setting aside the relief of injunction on the basis of the plaintiffs on the date of the suit merely on the ground that the possession was not claimed in the suit, when the plaintiffs had sought possession by seeking amendments by application exh.122-A rejection of which was a gross error in law in view of Order 41 Rule 1[A]?

[4] Whether a finding of fact is liable to be

set aside when important evidence is overlooked?

[5] Whether a finding of fact arrived at, on misconception of law should be set aside in Second Appeal?

[6] Whether the lower appellate court erred in finding custody on the basis of out of context, tits and bits and piecemeal reading of the evidence in total ignorance of evidence of actual user?

[7] Whether the appellate court erred in law in reversing the decree even when the defendants had given up the plea of tenancy and had claimed ownership under an oral contract particularly in absence of any evidence of their possession prior to the date of the suit and lack of any evidence of ownership as claimed?"

4. So far as he question no. 1 is concerned, the same would not arise for discussion as the suit was for injunction and the plaintiffs did not file original suit seeking possession of the property and further that the plaintiffs' application for amendment was rejected. It is also to be noted that in the appeal filed by the defendants, the plaintiffs did not make any application or cross-objections that the order rejecting their application for amendment being

bad, the order be set aside and the said amendment application be granted. In absence of any cross-objections against the rejection of the application for amendment seeking possession, order dated 6.2.2000 had become final and now cannot be allowed to be challenged in these proceedings.

5. So far as the second question is concerned, the same also cannot be answered in favour of the plaintiffs, because, they did not even amend the plaint by submitting that mandatory injunction be granted in favour of the plaintiffs restoring possession of the property.

6. So far as the question no. 3 is concerned, for the reasons stated aforesaid, in view of the order rejecting exh. 122-A, application filed under Order VI Rule 17 of the CPC, this question would not survive for consideration.

7. So far as the question no. 4 is concerned, I am unable to hold that any important evidence was overlooked making findings perverse. Undisputely, on the date of the judgment and decree of the learned trial court, the

plaintiffs, were not in possession of the property and under the circumstances, the trial court was not entitled to grant decree for injunction.

8. So far as the question no. 5 is concerned, the question is too wide in its effect and import when it simply says that the finding of fact is arrived on misconception of law. Learned counsel for the appellants was unable to tell me that what was the misconception of law.

9. So far as the question no. 6 is concerned, I am unable to hold that the learned first appellate court erred in recording findings of fact on reading stray sentences from the statements of the parties. The appellate court has referred to the statement of the plaintiff wherein he has admitted his dispossession and has also referred to the statement of the defendants wherein, he is asserting his possession and was claiming that he was in possession as tenant or he was in possession on payment of a sum of Rs. 80,000/-. I am unable to hold that the findings recorded by the learned first appellate court are in

ignorance of the evidence of actual use.

10. So far as the question no. 7 is concerned, I am unable to hold that the learned first appellate court was unjustified in reversing the findings recorded by the trial court even though the defendants have given up their case of tenancy.

11. In a suit for injunction, the question of title becomes immaterial. Basic question would be that who is in possession of the suit property on the date of the suit. In a given case, plaintiff may ask for mandatory injunction or in a given case, he may ask for prohibitory injunction. In the present case, the plaintiffs were asking for prohibitory injunction restraining the defendants from interfering with the possession. In a given case, if the plaintiff is not shown to be in possession on the date of the suit, then, the plaintiff must suffer dismissal, but in a case where the plaintiff comes out with an amendment that he has been dispossessed during pendency of the suit, therefore, possession be restored to him, then, he must persuade the trial court or the first appellate

court to grant such application. If such application is not granted, then, the suit would remain a suit for prohibitory injunction and in view of the admitted facts in the present case, an injunction cannot be granted because on the date of the judgment and decree, the plaintiffs are not shown to be in possession.

12. Taking into consideration the totality of the circumstances, legal position and the findings recorded by the first appellate court including the plaintiffs' application for amendment seeking possession and its dismissal, I am of the opinion that the learned first appellate court was not unjustified in granting the appeal and dismissing the suit.

13. The appeal deserves to and is accordingly dismissed. There shall be no order as to costs.

14. Let a decree be framed accordingly.

15. It is, however, made clear that this dismissal of the appeal and dismissal of the suit would not come in the way of the plaintiffs if the law permit them to file a suit for possession.

[R.S. GARG, J.]

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